Supreme Court, U.S.
FILED
OCT 16 2000
CLERK

(3)

No. 00-379

IN THE

Supreme Court of the United States

CONCORD BOAT CORPORATION, *et al.*,
Petitioners,

v.

BRUNSWICK CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

REPLY BRIEF

AMY LEE STEWART
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

BROOKS F. POLEY *
WINTHROP & WEINSTINE, P.A.
3000 Dain Rauscher Plaza
60 South Sixth Street
Minneapolis, Minnesota 55402
(612) 347-0700

Counsel for Petitioner

* Counsel of Record

October 16, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

14 pp

TABLE OF AUTHORITIES

CASES — Page

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) 9

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 9

Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) 2, 5

General Elec. Co. v. *Joiner*, 522 U.S. 136 (1997) 2

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 5

Kumho Tire Co. v. *Carmichael*, 526 U.S. 137 (1999) 2

Ocean State Physicians Health Plan Inc. v. *Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989) 10

Reeves v. *Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000) 1

Rotella v. *Wood*, 120 S. Ct. 1075 (2000) 7

SmithKline Corp. v. *Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978) 10

Twin City Sportservice, Inc. v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975) 7

United States v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) 5

United States v. *ITT Cont'l Baking Co.*, 420 U.S. 223 (1975) 5

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 7

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 5, 6, 7

STATUTE

15 U.S.C. § 15b 6

TABLE OF AUTHORITIES – continued

RULES

	Page
Amendments to Fed. Rules of Evidence, 192 F.R.D. 398 (2000)	2
Sup. Ct. R. 16.2	1
10(c)	5

SCHOLARLY AUTHORITIES

11 H. Hovenkamp, *Antitrust Law* (1998)	9
Thomas G. Krattenmaker & Steven C. Salop, *Analyzing Anticompetitive Exclusion*, 56 Antitrust L.J. 71 (1987)	10

REPLY BRIEF

Petitioners Concord Boat Corporation *et al.* seek review of a judgment of the United States Court of Appeals for the Eighth Circuit that was based on several rulings of law that conflict with decisions of this Court and the courts of appeals. Brunswick does not even question all of the splits of authority identified by petitioners, and, when it does, its objections are based on wholesale mischaracterizations of the decisions at issue. This case presents critical issues of evidence and antitrust law on which the courts are divided, and which warrant immediate resolution by this Court.

In an effort to deflect this Court's attention from the Eighth Circuit's legal errors, Brunswick devotes a third of its brief to rearguing the slanted theory of (selective) evidence that it presented to the jury – a theory that the jury *rejected*, and which therefore cannot be credited on appeal. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2109-10 (2000). Despite Brunswick's understandable attempt to recast the facts found by the jury, the inescapable truth of this case is that petitioners established a voluminous record of Brunswick's anticompetitive and unlawful conduct. See Pet. App. 56a-66a (discussing "substantial evidence" supporting petitioners' claims).[1] Such evidence, as the district court noted but respondent ignores, included "Brunswick's business documents [that] are riddled with acknowledgements of the anticompetitive nature of [its market-share] agreements." *Id.* at 65a. No factbound questions are presented, but only challenges to rulings of law by which the Eighth Circuit *nullified* the overwhelming evidence on which the jury relied. Because

---

[1] Brunswick's attack on the petitioners' statement of the case as lacking "a single citation to the record or opinions below," Opp. 1, is disingenuous. It is not customary to give extensive record citations in a petition to this Court, precisely because there is no record for this Court to review until certiorari is granted. *See* Sup. Ct. R. 16.2.

those rulings break with established precedents of this Court and the courts of appeals on matters of national significance, they clearly are worthy of this Court's review.

***Daubert* Ruling.** In excluding Dr. Hall's testimony, the Eighth Circuit held that, under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), expert testimony may be excluded if, in the judgment of an *appellate court*, the expert "has not considered all of the relevant facts." Pet. App. 27a. As demonstrated in the petition, this ruling is at odds with this Court's precedents and creates a deep split with other circuits. Pet. 26-29.

Brunswick weakly attempts to distinguish the court of appeals cases that conflict with the ruling below. It contends that three of the conflicting cases predate this Court's decision in *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), which purportedly "firmly established th[e] 'fit' requirement." Opp. 16 n.8. However, not only was the "fit" requirement established in *Daubert* itself, 509 U.S. at 591-92, but, as demonstrated in the petition, *Kumho Tire* did not alter the rule that challenges to the factual basis of an expert's opinion are not cognizable under *Daubert*. Pet. 27-28. Brunswick does not even address that analysis.[2]

In any event, Brunswick has to acknowledge that a number of the conflicting cases postdate *Kumho Tire*, and as to them it offers only the *ipse dixit* that the testimony challenged was not "inconsistent with facts critical to the outcome of the

---

[2] Unable to find case law aligned with the Eighth Circuit, Brunswick tries to wring support from the proposed amendment to Federal Rule of Evidence 702. Opp. 15. The proposed amendment, however, simply codifies the rule of *Kumho Tire* and *General Electric Co.* v. *Joiner*, 522 U.S. 136, 146 (1997), that an expert's method must be not only generally reliable but reliable when applied to the facts of the case. *Amendments to Fed. Rules of Evidence*, 192 F.R.D. 398, 418-21 (2000). The comment to that rule emphasizes that factual weaknesses in an expert's opinion are the subject of cross-examination. *Id.* at 420 ("rejection of expert testimony is the exception rather than the rule").

case." Opp. 16 n.8. But in each of those cases that was the exact argument of the party opposing admission of the testimony; the courts of appeals rejected such arguments as inapposite to *Daubert* and more properly posed to the trier of fact. Pet. 28-29.

Recognizing the indefensibility of the Eighth Circuit's approach under *Daubert* and *Kumho Tire*, Brunswick belatedly tries to attack Dr. Hall's methodology (*i.e.*, his use of the Cournot model) as generally inappropriate to antitrust cases, at least in markets where products are differentiated. Opp. 17.[3] Not only was any attack on the applicability of the Cournot model waived in the district court, Pet. App. 70a, but Brunswick's argument is baseless.

First, because every economic model is an abstraction, Dr. Hall was entitled to determine that product differentiation in the stern drive market did not outweigh other factors that favored use of the Cournot model. Second, Dr. Hall did examine an alternative model that accounted for product differentiation; he chose the Cournot model because its damages estimates were *more* conservative. Lodging L-079.[4] Third, and most fundamentally, Brunswick misrepresents Dr. Hall as using "the Cournot model to predict the 50/50 market division" that the Eighth Circuit questioned. Opp. 17. To the contrary, he selected the Cournot model (a model of duopoly pricing) in part *because* the economic structure of a competitive sterndrive market, based on his study of the facts,

---

[3] The Eighth Circuit stated that, based on a database search, "[i]t is unclear how often the Cournot model has been employed in antitrust cases." Pet. App. 28a n.11. Brunswick transforms that mild statement into a bald claim that the Cournot model "has *never* been applied in a reported antitrust case." Opp. 17. All that the Eighth Circuit's survey illustrates is that this bedrock model of antitrust law has never been *challenged* in a reported opinion.

[4] Because Brunswick continually misrepresents Dr. Hall's position, as discussed *infra*, petitioners have lodged his preliminary and supplemental expert reports with the Court.

suggested an equilibrium state in which there would be two dominant suppliers.[5] The Cournot model was used only to quantify damages by "determin[ing] the average price in a competitive market for stern drive and inboard engines and then subtract[ing] that price from an average actual price to determine an average overcharge per engine." Pet. App. 51a. The equal-shares assumption was not an output of the Cournot model, but rather an assumption used in calculating damages. See *id.*[6]

Because the Eighth Circuit's quarrel is with Dr. Hall's damages conclusion from his study of the market that Brunswick would have a 50% share in the absence of anticompetitive

---

[5] Dr. Hall based his conclusion principally on evidence that minimum efficient operating scale for a major competitor would require a share of up to one-third of the market. Lodging L-045. Furthermore, the assumption of an equilibrium in which competitors have equal shares is reasonable given that even in the anticompetitive market only two competitors (Brunswick and the OMC/Volvo joint venture) account for 95% of the market, and that Brunswick's share was only slightly more than 50% prior to its institution of the new market-share program. And, contrary to Brunswick's assertions, Dr. Hall testified that he did consider all the market events relied on by Brunswick in evaluating his equal-shares assumption, even though he did not incorporate them numerically into the model. Pet. App. 29a. Dr. Hall's conclusions are fully supported by the record, as the district court found. *Id.* at 71a. Brunswick's argument that "Hall . . . viewed a 50/50 market division as an affirmative goal of antitrust law," Opp. 16, and propounded a theory whereby a firm risks antitrust violations if its share exceeds 50%, *id. at* 17, is sheer nonsense.

[6] Because the Cournot model (and the 50% share assumption) only has conceivable relevance to damages quantification, there is no good-faith basis for Brunswick's assertion that Dr. Hall based his liability opinion on the 50% share assumption. Opp. 10 n.6. All of the excerpts of Dr. Hall's testimony cited by Brunswick relate to damages quantification by comparing actual versus benchmark engine prices. *See id.* Similarly groundless is Brunswick's repeated assertion that Dr. Hall's 50% share assumption was petitioners' "only" proof of anticompetitive conduct and antitrust injury. *Id.* at i, 9. Dr. Hall relied on massive record evidence of anticompetitive conduct and injury. Pet. App. 71a.

conduct, it is in direct conflict with *Daubert*, which permits exclusion of expert evidence only based on unreliable "principles and methodology," not on "the conclusions that they generate." *Daubert*, 509 U.S. at 595. The Eighth Circuit's basic misconception of *Daubert* has created a deep conflict of authority on this critical issue of evidence law.

Clayton Act Ruling. On the issue of whether the holding of anticompetitive assets is a continuing violation of section 7 of the Clayton Act, the petition demonstrated a clear conflict of law between the decision below and this Court's rulings in *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), and *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). Pet. 14-15. Such a conflict on an important question of federal law warrants this Court's review. See Sup. Ct. R. 10(c).

Brunswick grasps at straws in trying to distinguish *ITT* and *du Pont*, arguing that neither case involved a private action for damages. Opp. 22. That is a red herring, and has no bearing whatever on the conflict of authority as to whether the retention of anticompetitive assets constitutes a continuing violation of section 7.

Once the Eighth Circuit's error on this issue is corrected, the resolution of the limitations question is straightforward. Under *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) (*Zenith II*), "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and ..., as to those damages, the statute of limitations runs from the commission of the act." *Id.* at 338. The "act" referred to in *Zenith II* means an act in violation of the antitrust laws. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in the judgment). Under *ITT* and *du Pont*, the unlawful retention of assets is a present "act" in violation of the Clayton Act, not a past act or the "unabated inertial consequence[]" of a past act, as the Eighth Circuit asserted. See Pet. App. 20a.

Thus, petitioners are unquestionably entitled to recover all damages from antitrust injury attributable to Brunswick's illegal retention of anticompetitive assets in the four years prior to its commencement of suit in 1995. The limitations rule of section 4B of the Clayton Act, 15 U.S.C. § 15b, thus cannot be invoked to overturn the jury's verdict for damages sustained from December 7, 1991 to the date of verdict, Pet. App. 44a-45a. By failing to recognize that a new cause of action accrues "each time a plaintiff is injured" by a continuing violation of the antitrust laws, *Zenith II*, 401 U.S. at 338, the Eighth Circuit has adopted a rule contrary to that of numerous courts of appeals decisions properly applying the *Zenith* rule to continuing antitrust violations. See Pet. 16-17.[7] Even though the Eighth Circuit's conflict with *ITT* and *du Pont* is enough to justify certiorari, this corollary conflict of authority underscores the importance of this Court's resolution of the question presented.

The other arguments Brunswick offers in defense of the Eighth Circuit's ruling are not only more properly directed to the merits phase, but they are also wrong. First, the fact that Brunswick injured petitioners by violating section 7 as early as 1986 does not forever grant it damages immunity for illegal acts (the unlawful holding of anticompetitive assets) that it committed after 1991. Brunswick is not entitled to repose when it continues to violate the law. As the Ninth Circuit held in rejecting such a rule, that would mean that an action for damages from a present violation of the antitrust laws would be barred before the injury even occurred. See

---

[7] Brunswick attempts to distinguish these cases on the irrelevant ground that none involved the retention of acquired assets. Opp. 23 & n.11. The conflict in the circuits regards the interpretation of *Zenith* and the statute of limitations set forth in Clayton Act section 4B, which apply to *all* antitrust violations. 15 U.S.C. § 15b. It is immaterial to the limitations question whether the underlying claims in those cases were Sherman or Clayton Act claims.

Twin City Sportservice, Inc. v. *Charles O.Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975).

Second, Brunswick errs in faulting petitioners for characterizing section 4B as limiting the period in which damages may be recovered. See Opp. 23-24. That is exactly how this Court interpreted the statute in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (*Zenith I*), where the issue decided by the Court was whether certain claimed damages from the continuing anticompetitive acts of a patent pool fell within the statutory "damages period" established by section 4B. See *id.* at 108 & n.2, 116, 118-19. Section 4B sets a damages period because the cause of action accrues upon the incurring of antitrust damages, and thus "[t]o recover those damages, [a plaintiff] must sue within the requisite number of years from the accrual of the action." *Zenith II*, 401 U.S. at 339.[8] It is this rule, not the Eighth Circuit's deviation, which furthers the policies of justifiable repose and certainty about liability. See *Rotella* v. *Wood*, 120 S. Ct. 1075, 1082 (2000). Brunswick's objections have no basis, and this Court should resolve the important conflict of law created by the Eighth Circuit's Clayton Act ruling.

Sherman Act Rulings. Brunswick's objections to certiorari on the Sherman Act questions similarly have no force, and cannot diminish the importance of resolving the conflicts of authority generated by the decision below.

1. *Universal Exclusion Rule*. The Eighth Circuit held that Brunswick's market-share agreements restricting the purchase of competitive products were not an unreasonable restraint of trade because the exclusionary effects were not universal, and

---

[8] There is no inconsistency between this general rule, acknowledged by petitioners (Pet. 17 n.4), and their seeking of additional damages for the period of 1986 to 1991. Petitioners claimed those earlier damages based on a theory of tolling by fraudulent concealment. Petitioners' entitlement to such damages is no longer at issue because the jury did not award damages for injuries sustained prior to 1991. Pet. App. 45a.

certain customers switched to competitors. Pet. App. 34a. As demonstrated in the petition, this rule is flatly at odds with this Court's precedent that the unreasonableness of a restraint is measured by the overall effect on market competition, not effects on specific customers. Pet. 20-21.

Citing authority that agreements that do not "lock in" customers are not unreasonable, Brunswick claims that the "'universal-exclusion rule' ... played no role – indeed, was not even hinted at – in the court of appeals' decision." Opp. 27. But the point is that the Eighth Circuit nullified overwhelming evidence from customers, competitors, Dr. Hall (whose testimony was considered for purposes of this ruling), and Brunswick's documents that boatbuilders were in fact "locked in" – particularly by the multiyear structure of those agreements and the reinforcing tier of *dealer* rebate programs that penalized dealers who accepted competitive engine brands from boatbuilders. The only reason the Eighth Circuit gave for overriding the jury's reliance on this evidence was that as a matter of law restrictive agreements do not unreasonably restrain trade because two of the "hundreds of boatbuilders," *id.* at 2, switched to competitors. Pet. App. 34a. This rule cannot be reconciled with the precedents of this Court or of the sister circuits of the court below.

2. *Market power*. Petitioners also demonstrated a split of authority on what constitutes sufficient proof for a jury to infer market power. Pet. 22-23. Brunswick does not contest this split of authority, but oddly (and wrongly) contends that the question is not presented because the Eighth Circuit did not decide the issue. See Opp. 13 n.7. In fact, the Eighth Circuit squarely addressed this issue *via* its discussion of entry barriers and Brunswick's capacity to control prices, essential features of market power. Pet. App. 34a-35a.

3. *Above-Cost Rule*. To counter the conflict of authority surrounding the Eighth Circuit's invocation of this rule, see Pet. 23-26, Brunswick attempts to whitewash the record below and have this Court resolve the issue by simplistic

analogy to cases involving straightforward volume discounts. Opp. 25-29. But the discounts it offered did not "attac[h] merely to the quantity of goods purchased." 11 H. Hovenkamp, *Antitrust Law* ¶ 1807c, at 120 (1998). Brunswick tied the discounts to reductions in competitors' market share for no economic purpose other than destroying competition; a customer could obtain high discounts by *reducing* volume so long as it met share targets, and lower-volume customers that cut competitive purchases could obtain *larger* discounts than high-volume customers who did not. Thus, ordinary volume-discount cases like *Barry Wright* and *Brooke Group* are wholly inapposite.[9] The illogic of Brunswick's whitewash is demonstrated by its woeful attempt, Opp. 29-30, to glean support from the scholarly articles that condemn Brunswick's agreements even as they recognize the validity of volume discounts. See Pet. 18-19.

As its own documents repeatedly acknowledge, Pet. 4-5, Brunswick applied these discounts to purchase a barrier to entry: namely, to "tax" competitive purchases so as to prevent competitors from achieving minimum economic scale. Brunswick used the market-share discounts in tandem with a dealer rebate program to deny boatbuilders the ability to make economically rational decisions, and adopted multiyear agreements that, given industry purchasing cycles, made it impossible for competitors to match discounts over their smaller base of customers for a sustained period. See Pet. 4-7;

---

[9] *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), involved a quantity discount arrangement between a manufacturer and a single customer with no competitive restrictions which came about after the plaintiff manufacturer breached its own supply agreement with defendant customer. In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court rejected plaintiff's claim that a manufacturer's volume rebates to wholesalers in furtherance of a predatory pricing scheme threatened substantial injury. The other court of appeals cases cited by Brunswick similarly do not involve market share agreements and are readily distinguishable on the facts.

Lodging L-027 to L-028. This case is about exclusionary conduct, not price competition, and it is immaterial that Brunswick offered a price discount and not some other form of consideration to boatbuilders to abide by these agreements.[10]

Because the above-cost rule has no applicability outside of predatory-pricing claims, the decision below conflicts with established law, and most directly with the Third Circuit's decision in *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056, 1065 (3rd Cir. 1978). Pet. 25-26. In that case, as here, the offending firm used price discounts to impose structural disadvantage on competitors and ensure that purchase decisions would not be "determined by the economic laws of a competitive market." *SmithKline*, 575 F.2d at 1060-62, 1065. *SmithKline* is not distinguishable because it involves tying, cf. Opp. 25, which is simply one form of exclusionary conduct, see Krattenmaker, *supra* at 72. This Court should resolve this split of authority.

CONCLUSION

Although this Court has never required conflicts on every issue when multiple questions are presented, such conflicts are present here. This Court should grant the petition.

---

[10] Exclusionary conduct is any conduct which denies equal access to competitors so as to give the excluding firm the market power to charge supracompetitive prices. Thomas G. Krattenmaker & Steven C. Salop, *Analyzing Anticompetitive Exclusion*, 56 Antitrust L.J. 71, 73 (1987). *See also Ocean State Physicians Health Plan, Inc.* v. *Blue Cross & Blue Shield*, 883 F.2d 1101, 1110 (1st Cir. 1989) (exclusionary conduct often defined in part as "behavior [which] tends to impair the opportunities of rivals"). Notwithstanding Brunswick's assertions, *see, e.g.*, Opp. 1, there is nothing inconsistent about charges that it offered effective discounts and maintained supracompetitive prices. This is an industry characterized by significant barriers to entry and expansion, Lodging L-013 to L-014, and the market-share program exploited and solidified the structural disadvantages of Brunswick's competitors (including the limited available market created by Brunswick's unlawful acquisitions of large customers).

Respectfully submitted,

AMY LEE STEWART
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

BROOKS F. POLEY*
WINTHROP & WEINSTINE, P.A.
3000 Dain Rauscher Plaza
60 South Sixth Street
Minneapolis, Minnesota 55402
(612) 347-0700

Counsel for Petitioners

*Counsel of Record

October 16, 2000